

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL SHANE THORNTON

Claimant

V.

CITY OF WINFIELD

Respondent

AND

KANSAS EASTERN REGION INS. TRUST

Insurance Carrier

Docket No. 1,076,122

ORDER

Claimant requests review of the March 25, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Brad E. Avery, of Wichita, Kansas, appeared for the claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from March 17, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant was not an employee of respondent under the Kansas Workers Compensation Act (Act) and denied claimant's request for benefits.

Claimant appeals, arguing the ALJ erred and exceeded her jurisdiction by finding claimant was not a volunteer employee of respondent. Claimant alleges the ALJ's findings were contradictory to the plain language of the applicable statutes and the stated intent of the Act that it should be liberally construed to bring both employers and employees under its provisions. Claimant requests the ALJ's Order be reversed and medical benefits and temporary total disability benefits awarded.

Respondent contends claimant was not an employee or a volunteer and that the accident was caused by reckless disregard of a safety rule. Therefore, the ALJ's Order should be affirmed.

The issue on appeal is whether claimant was an employee of respondent under the Act and entitled to benefits.

FINDINGS OF FACT

Claimant, a former inmate of Winfield Correctional Facility, participated in a work program between the prison and City of Winfield (respondent) while incarcerated. Claimant initially worked inside the prison and made 60 cents a day and was paid by Kansas Department of Corrections (KDOC). Claimant filled out a Form 9, requesting he be allowed to work outside the prison, at the same rate of pay. Claimant was incarcerated until August 2013, and then returned to prison at a different facility from October 2013 through November 2015. Any time claimant worked, at either facility, both inside and outside the facility, claimant was paid the same 60 cents per day rate by KDOC.

Claimant testified, after being assigned the job with respondent, he was transported to the job site by a respondent employee who came to the prison and picked the workers up in a respondent owned van. The job site claimant and other workers were taken to was five to ten minutes from the prison. Claimant's supervisor, a person named Tim, gave out work assignments and directed the work being done. Claimant testified that another inmate showed him how to operate the John Deer Gator utility vehicle he used for the job.

On April 8, 2013, claimant was performing janitorial work for respondent at a sports complex, and while on his way to start his lunch break, claimant collided the John Deer Gator utility vehicle he was driving with a pickup truck crossing the street. Claimant injured his right shoulder, neck and the area between his shoulder blades in the accident. He received immediate care through the emergency room. Claimant did not receive a bill for this visit, but it was paid.

Claimant understands there is a dispute as to whether he was actually employed by respondent. He indicated the work he was performing was not as a condition of probation or in lieu of paying a fine, nor was he performing the work as a condition for suspension of his sentence or as part of a contract of diversion. To claimant's knowledge he was never assigned to a community corrections program and was never a part of a conservation camp. After his accident and treatment, claimant did not go back to work outside of the prison. A year after the accident, claimant went back to work inside the prison.

Claimant testified that the tasks he performed inside the prison were the same as those he performed for respondent, such as ground maintenance and janitorial work. Claimant had no interview, no preemployment physical or drug screen and did not receive

any orientation or benefits. His lunch was provided by KDOC, who also controlled who got to go out on jobs and who had to stay at the prison. Claimant was considered an inmate while performing tasks for respondent. Respondent had no official capacity to reprimand claimant.

Warren Porter, City Manager for respondent, testified he is responsible for the operations and management of the financial situations for respondent. He has held this position for almost 20 years. He occasionally works with the Warden or Deputy Warden at the prison on a variety of programs and issues.

On November 4, 2002, Mr. Porter and the Warden at Winfield Correctional Facility, signed a Memorandum of Understanding that the prison would provide respondent with inmates to perform work on projects. The agreement provided that the KDOC could withdraw some or all of the inmates from a job at any time.

Mr. Porter believed respondent had not elected to provide workers compensation coverage for volunteers or community service members. However, a Department of Labor Election Data Report indicates respondent had coverage for volunteer workers. Mr. Porter was unaware of this.¹ He testified inmates were not considered employees of respondent. As far as Mr. Porter knows, during his time with respondent, it has not elected to afford community service workers or volunteers to come under the Workers Compensation Act.² He indicated the workers from the prison were considered inmates at all times. Mr. Porter indicated that should the program with the prison stop tomorrow, respondent would not hire additional people to fill those roles or perform those tasks. Mr. Porter testified respondent did not pay the inmates, did not provide benefits to the inmates, did not control when the inmates were at the job sites, did not control or influence the inmates, did not interview the inmates and did not have the ability to perform preemployment drug or alcohol screening or preemployment physicals.

Mr. Porter indicated it was his belief that the work the inmates were performing was community service work and the work was not meant to replace employees. The program that claimant was working in was meant only for inmates. No members of the public could volunteer to be in the program.

¹ P.H. Trans. at 40-41.

² *Id.*, Resp. Ex. A.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-508(a)(b)(m) states:

(a) "Employer" includes:

(1) Any person or body of persons, corporate or unincorporated, and the legal representative of a deceased employer or the receiver or trustee of a person, corporation, association or partnership; (2) the state or any department, agency or authority of the state, any city, county, school district or other political subdivision or municipality or public corporation and any instrumentality thereof; and (3) for the purposes of community service work, the entity for which the community service work is being performed and the governmental agency which assigned the community service work, if any, if either such entity or such governmental agency has filed a written statement of election with the director to accept the provisions under the workers compensation act for persons performing community service work and in such case such entity and such governmental agency shall be deemed to be the joint employer of the person performing the community service work and both shall have the rights, liabilities and immunities provided under the workers compensation act for an employer with regard to the community service work, except that the liability for providing benefits shall be imposed only on the party which filed such election with the director, or on both if both parties have filed such election with the director; for purposes of community service work, "governmental agency" shall not include any court or any officer or employee thereof and any case where there is deemed to be a "joint employer" shall not be construed to be a case of dual or multiple employment.

(b) "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, attendants, as defined in subsection (d) [(f)] of K.S.A. 65-6112, and amendments thereto, drivers of ambulances as defined in subsection (b) [(d)] of K.S.A. 65-6112, and amendments thereto, firefighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; persons in the service of the state as volunteer members of the Kansas department of civil air patrol, but only to the extent and during such periods as they are officially engaged in the performance of functions specified in K.S.A. 48-3302, and amendments thereto; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed [an election]

to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.

. . .

(m) "Community service work" means: (1) Public or community service performed as a result of a contract of diversion or of assignment to a community corrections program or conservation camp or suspension of sentence or as a condition of probation or in lieu of a fine imposed by court order; or (2) public or community service or other work performed as a requirement for receipt of any kind of public assistance in accordance with any program administered by the secretary of social and rehabilitation services.

Claimant's participation in the work program through KDOC provides the inmates with a minimum of income and something to occupy their time while in prison. It is not a volunteer program, but is more akin to a corrections program associated with the community in which the prison is located. As such, the work program would qualify as a community corrections program under K.S.A. 2012 Supp. 44-508(m).

Such programs can be covered by the Act if an election is filed to extend coverage to the workers. In this instance, respondent filed an election to cover volunteers, but not community service work.

The ALJ determined claimant's situation was not covered by the Act and this Board Member agrees. KDOC supervised claimant's work, determined when and where claimant would work and paid the small allowance provided for the work performed. Claimant has failed to prove he was an employee of respondent. As such, no benefits can be awarded, and all other issues are moot. The Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

³ K.S.A. 2014 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove he was an employee of respondent for the purposes of the Act. As such, benefits cannot be awarded under the Act.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant dated March 25, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge